KHU CHOK KII & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG J.
[CRIMINAL APPEAL NO. 20 OF 1993]
15 OCTOBER 1993

CRIMINAL APPEAL: Charge of being knowingly in possession of uncustomed goods - Customs Act 1967 s. 135(1)(d) - Refusal by Magistrate to release vehicle used in commission of offence - Whether order of Magistrate appealable - Criminal Procedure Code s. 307 - Whether s. 407 of the Code adequately considered.

WORDS AND PHRASES: "Order" - Criminal Procedure Code s. 307(1).

The accused was charged with an offence under s. 135(1)(d) of the Customs Act 1967 for knowingly having in possession 23 cartons of Heineken beer for which customs duty had not been paid. The facts showed that in connection with the offence a lorry belonging to the second appellant had also been seized by the Customs. At the onset of the hearing Counsel for the accused applied to the Court for the release of the lorry under s. 407 (ii) & (iv) of the Criminal Procedure Code but the application was disallowed by the learned Magistrate. Apparently the decision of the learned Magistrate was grounded upon his opinion that it was not open for him to interfere with the exercise of discretion by the Senior Officer of Customs who intended to sell off the said lorry under s. 115 of the Customs Act. The present appeal was in respect of this order of the learned Magistrate.

The issues were :

1. Whether the decision of the learned Magistrate refusing to release the lorry was an order within the meaning of s. 307(1) of the Criminal Procedure Code and therefore appealable or whether it was a mere procedural ruling against which there was no right of appeal.
2. Whether the learned Magistrate failed to give adequate consideration to the provisions of s. 407 of the Code.

Held:

[1] In order to attract the provisions of s. 307(1) of the Code the order in question must be a final order in the sense that the order finally disposes of the rights of the parties. In the instant case the learned Magistrate's order coupled with the desire by the Customs Department to sell the lorry in apparent exercise of its discretion under s. 115 of the Customs Act had the effect of depriving the second appellant of ownership of the said lorry. There is thus finality in its effect and the order therefore is a final order appealable under s. 307(1).

[2] The stated ground of the learned Magistrate's decision was not well founded as the learned Magistrate did not direct his mind to the correct issues involved. The learned Magistrate has also erred in refusing to invoke s. 407 of the Code.

[3] Whenever reliance is made upon s. 115(1)(c) of the Customs Act 1967 by the Customs, it is incumbent upon them to show to the Court on a reliable basis that the conditions as set out in that section have been satisfied.

[Appeal allowed].

Cases referred to:

Public Prosecutor v. Raymond Chia Kim Chwen & Anor. [1985] 2 MLJ 436 ***(foll)***

Public Prosecutor v. Hoo Chang Chwen [1962] MLJ 284 ***(cit)***

Public Prosecutor v. R.K. Menon & Anor. [1978] 2 MLJ 152 ***(cit)***

Legislation referred to:

Criminal Procedure Code, ss. 51, 307(1), 407(ii) & (iv)
Customs Act 1967, ss. 115(1)(c), 135(1)(d), (i)

For the appellants - Chen Tai Huong; M/s. Chen & Co.
For the respondent - Thomas Akin, DPP

JUDGMENT

Steve Shim Lip Kiong J:

In the Magistrate's Court, the accused Khu Chok Kii was charged with an offence of knowingly in possession of uncustomed goods to wit 23 ctns. x 24 cans x 330 ml. of Heinekan beer on which customs duty leviable by law amounting to RM3,106.22 had not been paid, an offence under s. 135(1)(d) of the Customs Act 1967 and punishable under s. 135(1)(i) thereof. Looking at the notes of proceedings in the Magistrate's Court, it would appear that as soon as the accused had pleaded not guilty to the amended charge, the defence counsel Mr. Chen Tai Huong applied for the release of the lorry QS3759 which had been seized by the Customs Department in connection with the offence charged.

Mr. Chen had invoked the provisions of s. 407(ii) & (iv) of the Criminal Procedure Code. The application was disallowed by the learned Magistrate on the ground that he could not interfere with the proper exercise of discretion by the Senior Officer of Customs under s. 115 of the customs Act 1967. Against this decision or order, the accused and one Khu Chiok Mee, the purported owner of the lorry QS3759 have now appealed to this Court.

At the outset of this appeal, the learned Deputy Public Prosecutor has raised a preliminary issue in relation to the provisions of s. 307(1) of the Criminal Procedure Code. He has submitted that in the instant case the decision or order of the Magistrate's Court in disallowing release of the lorry QS3759 is merely a procedural ruling and as such it is not appealable, citing in support the case of *Public Prosecutor v. Raymond Chia Kim Chwen & Anor.* [1985] 2 MLJ 436 where the Federal Court held that the decision or order of the Magistrate's Court to issue a summons under s. 51 of the Criminal Procedure Code was a final order and not a procedural ruling in the sense described in *Public Prosecutor v. Hoo Chang Chwen* [1962] MLJ 284 and *Public Prosecutor v. R.K. Menon & Anor.* [1978] 2 MLJ 152.

Now, s. 307(1) stipulates as follows:

> Except in any case to which s. 304 applies and subject to the provisions of ss. 305 and 306 any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is party may prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging, within ten days from the time of such judgment, sentence or order being passed or made, with the clerk of such Magistrate's Court a notice of appeal in triplicate addressed to the High Court and by paying at the same time the prescribed appeal fee.

In construing this subsection, Hashim Yeop Sani, SCJ (as he then was) in *Public Prosecutor v. Raymond Chia (supra)* is of the view that since the word "order" is preceded by the words "judgment" and "sentence", the order in question must therefore be a final order in the sense that it is final in its effect as in the case of a judgment or a sentence. According to him, the test for determining finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. He is of the view that the decision or order of the Magistrate's Court to issue a summons under s. 51 of the Criminal Procedure Code is a final order in the sense that it is final in its effect and therefore appealable under s. 307(1) of the same Code.

In this particular case, the Magistrate's Court has made a decision or order disallowing the release of the lorry QS3759 seized by the Customs Department in connection with the alleged offence. Such decision or order has the effect of allowing the lorry to remain in the custody and possession of the Customs Department which has indicated its desire or intention to sell off the said lorry in apparent exercise of its discretion under s. 115(1)(c) of the Customs Act thereby giving rise to the consequential effect of depriving Khu Chiok Mee the purported owner of peranent ownership thereof. There is therefore finality in its effect. In the circumstances, the decision of the Magistrate's Court is a final order and therefore appealable under s. 307(1) of the Criminal Procedure Code. This I so hold.

I come now to the substantive appeal. As I have stated earlier, Khu Chok Kii the accused and Khu Chiok Mee, the purported owner of the lorry QS3759, both of whom have been described as the appellants in this case, have appealed against the decision or order of the Magistrate's Court in refusing to grant the release of the said lorry upon the stated ground that the learned Magistrate had failed to consider adequately or at all the provisions of s. 407 of the Criminal Procedure Code. I have also stated that the learned Magistrate had refused to grant the release on the principal ground that he could not interfere with or intervene in the exercise of discretion by the Senior Officer of Customs in disposing or wanting to dispose off the said lorry under s. 115(1)(c) of the Customs Act 1967, which exercise, in the view of the learned Magistrate, was legitimate and proper in the circumstances. Mr. Chen has, in this appeal, questioned the basis upon which the learned Magistrate has grounded his decision by raising the issue as to whether the Senior Officer of Customs could properly have exercised his discretion under the said s. 115(1)(c).

Now, s. 115(1)(c) stipulates thus:

> (1) Where any movable property has been seized under this Act, a senior officer of customs may, at his discretion:
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> (a) ...(not applicable)
> (b) ...(not applicable)

(c) sell or destroy the movable property, as appropriate in the circumstances, where it is a living creature or where, in the opinion of a Senior Officer of Customs, it is of a perishable nature or likely to speedily deteriorate in quality or value, and where it is so sold, he shall hold the proceeds of sale to abide the result of any prosecution or claim.

It seems clear therefore that the discretion of the Senior Officer of Customs to sell any movable property is dependent upon the following conditions, namely, where the movable property is a living thing or where he is of the opinion either that the movable property is of a perishable nature or that it is likely to speedily deteriorate in quality or value.

In the instant case, the prosecuting officer Mr. Goh Ban Peng who was also a Senior Officer of Customs had intimated to the Magistrate's Court that "the Customs Department intended to sell the said lorry and was offering to sell it to the owner by virtue of s. 115(1)(c) of the Customs Act." Notwithstanding the intimation, it is not clear as to whether any offer of sale had infact been made but in any event, the learned Magistrate had apparently construed such intimation as nothing more than an intention or wish on the part of the Customs Department to sell the lorry to the registered owner. In my view, it may not be sufficient merely to express an intention or wish to sell. There should be some positive steps taken to effectualize this such as the existence of a written offer of sale made by the Customs Department to the registered owner, etc. There is certainly no such indication in this case.

Mr. Chen has contended that the Senior Officer of Customs could not properly rely on his discretionary power under s. 115(1)(c) aforesaid because the lorry in question is not movable property of a perishable nature nor is it one which is likely to speedily deteriorate in quality or value. It should be noted that there is no indication whatsoever by the Prosecuting Officer or any other Senior Officer of Customs that, in his opinion, the lorry QS3759 is to be regarded as movable property of a perishable nature or one that is likely to speedily deteriorate in quality or value in the circumstances of this case. I think it is incumbent upon the Customs Department to show to the Court on a credible basis that the conditions in s. 115(1)(c), upon which it relies, have been satisfied. This has not been done here.

Reading the ruling of the learned Magistrate as a whole, I cannot help but agree with Mr. Chen Tai Huong that the learned Magistrate had not directed his mind to the correct issues involved. In the circumstances and for the reasons given, I am constrained to hold that the learned Magistrate has erred in refusing to invoke s. 407 of the Criminal Procedure Code. I will therefore allow this appeal and order that the case be remitted to the Magistrate's Court so that appropriate action can be taken under s. 407 aforesaid.